

SUPERIOR COURT
OF THE
STATE OF DELAWARE

E. SCOTT BRADLEY
JUDGE

SUSSEX COUNTY COURTHOUSE
1 The Circle, Suite 2
GEORGETOWN, DE 19947

March 5, 2009

Bruce L. Waples
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RE: State of Delaware v. Bruce L. Waples
Def. ID # 0610029325
Letter Opinion

Date Submitted: November 3, 2008

Dear Counsel and Mr. Waples:

This is my decision on Bruce L. Waples' motion for postconviction relief. He supplemented his motion with seven amendments. Waples was an inmate at the Sussex County Violation of Probation Center. He punched a guard in the mouth and jaw while the guard was escorting him through the facility. The punch to the guard's mouth knocked a tooth out. Waples was charged with and convicted of Assault in a Detention Facility.¹ I sentenced Waples to four years at Supervision Level V, suspended after two years for probation. The Supreme Court affirmed Waples' conviction.²

¹ 11 Del.C. § 1254.

² *Waples v. State*, 945 A.2d 1168, 2008 WL 555647 (Del. March 3, 2008), rehearing denied (April 22, 2008) (TABLE).

This is Waples' first motion for postconviction relief and it was filed in a timely manner. The State of Delaware was represented by Deputy Attorney General Martin J. Cosgrove, Jr. Waples was represented by Robert H. Robinson, Jr. Both have filed affidavits in this matter. I have concluded that, given the nature of the allegations, a hearing is not necessary.

A. Ineffective Assistance of Counsel

Waples alleges Robinson was ineffective because he allegedly (1) failed to request a continuance to give him time to get the guard's dental records so that the guard's credibility could be impeached, (2) was unqualified to handle a jury trial, (3) failed to prepare for trial, (4) did not properly cross-examine the State's witnesses, (5) did not look for exculpatory evidence, (6) failed to consult with Waples, (7) failed to object to the guard's testimony, and (8) failed to present mitigating evidence at sentencing.

The United States Supreme Court has established the proper inquiry to be made by courts when deciding a motion for postconviction relief.³ In order to prevail on a claim for ineffective assistance of counsel pursuant to Superior Court Criminal Rule 61, the defendant must engage in a two-part analysis.⁴ First, the defendant must show that counsel's performance was deficient and fell below an objective standard of reasonableness.⁵ Second, the defendant must show that the deficient performance prejudiced the defense.⁶ Further, a defendant "must make and substantiate concrete

³ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁴ *Strickland*, 466 U.S. at 687.

⁵ *Id.* at 687.

⁶ *Id.* at 687.

allegations of actual prejudice or risk summary dismissal.”⁷ It is also necessary that the defendant “rebut a ‘strong presumption’ that trial counsel’s representation fell within the ‘wide range of reasonable professional assistance,’ and this Court must eliminate from its consideration the ‘distorting effects of hindsight when viewing that representation.’”⁸ There is no procedural bar to claims of ineffective assistance of counsel.⁹

1. Continuance

Waples alleges that Robinson was ineffective because he did not request a continuance so that he could get the guard’s dental records. The dental records would have, according to Waples, shown that the guard lied about his tooth being knocked out. Robinson stated that he did not ask for a continuance because there was no reason to believe that the guard was lying about his tooth being knocked out. Waples is just speculating about what the guard’s dental records would have disclosed. Given that the guard was punched in the mouth and appeared in court and showed the jury where his tooth used to be and also showed the jury the partial denture he was using until he could get a tooth implant, there is simply no reason to believe that there is any credence to Waples’ allegations. Moreover, the State did give Robinson the guard’s dental bills. The bills show that the guard got a partial denture and had an appointment for more dental appointments, including an appointment for oral surgery. This allegation is without merit. _____

⁷ *State v. Coleman*, 2003 WL 220927241, at *2 (Del. Super. Feb. 19, 2003).

⁸ *Coleman*, 2003 WL at *2, quoting *Strickland*, 466 U.S. at 689.

⁹ *Coleman*, 2003 WL at *1, citing *State v. Johnson*, 1999 WL 743612, at *2 (Del. Super Aug. 12, 1999); *State v. Gattis*, 1995 WL 790961, at *7 (Del. Super. Dec. 28, 1995), *aff’d.*, 637 A.2d 1174 (Del. 1997).

2. Jury Trial

Waples alleges that Robinson was not qualified to handle a jury trial. There is no basis for this allegation. Robinson has been a member of the Delaware Bar since 2001, and has handled a number of criminal trials. This allegation is without merit.

3. Trial Preparation

Waples alleges that Robinson did not prepare for trial. There is no basis for this allegation. Robinson met with Waples a number of times. He also asked for and received discovery. Robinson also went to the Violation of Probation Center and reviewed the videotape of the incident. He also interviewed several witnesses to the incident. This was a relatively simple case and Robinson more than adequately investigated the facts and prepared for trial. This allegation is without merit.

4. Cross-Examination

Waples alleges that Robinson did not properly cross-examine the State's witnesses. Waples does not state what else Robinson should have done. Therefore, this allegation is conclusory and, as such, without merit.

5. Exculpatory Evidence

Waples alleges that Robinson did not look for exculpatory evidence. Waples is focused on the guard's dental records. As I noted earlier, this is mere speculation. The guard's dental bills, and testimony, show that he underwent repeated dental care. There is simply no basis for Waples' belief that the guard lied about his tooth being knocked out. This allegation is without merit.

6. Consultation

Waples alleges that Robinson did not consult with him. This is not true. Robinson did consult with Waples. This allegation is without merit.

7. Guard's Testimony

Waples alleges that Robinson was ineffective because he failed to object to the guard's testimony. Waples does not allege what testimony Robinson failed to object to or why he should have objected to it. It appears Waples believes that Robinson should have objected to the prosecutor having the guard show his partial denture to the jury. The prosecutor did this to show that the guard was missing a tooth, proving that the guard sustained a physical injury, one of the elements of Assault in a Detention Facility.¹⁰ This evidence was relevant and not unfairly prejudicial. This allegation is without merit.

8. Mitigating Evidence

Waples alleges that Robinson should have presented mitigating evidence at sentencing. Waples does not state what mitigating evidence Robinson should have presented. Therefore, this allegation is conclusory and, as such, without merit.

B. Prosecutorial Misconduct

Waples alleges that the State committed prosecutorial misconduct when (1) the prosecutor knowingly used the guard's perjured testimony, (2) the prosecutor did not mention the guard's tooth being knocked out in his opening statement, (3) the prosecutor committed discovery violations, (4) the prosecutor improperly commented on Waples' courtroom demeanor, and (5) the prosecutor misstated the evidence in his closing statement.

1. Perjured Testimony

Waples alleges that the prosecutor knowingly used the guard's perjured testimony in order to obtain a conviction. Waples appealed this issue to the Supreme Court. The Supreme Court

¹⁰ 11 Del.C. § 1254.

determined that the prosecutor did not improperly vouch for the guard's testimony nor did he suborn perjury by allowing the guard to testify.¹¹ This claim was raised on appeal and is, therefore, barred by Rule 61 (i)(4) unless reconsideration of the claim is warranted in the interest of justice. Waples has merely repeated a claim that he has already made. Therefore, he has not met this requirement. This allegation is without merit.

2. Opening Statement

Waples alleges that the prosecutor did not mention the guard's tooth being knocked out in his opening statement. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples' argument is factually incorrect. During the prosecutor's opening statement he stated, "as a result of the assault, the guard suffered physical injury to his teeth and a laceration or scrape to his face by being struck by the defendant."¹² This allegation is without merit.

3. Discovery

Waples alleges that the prosecutor should have turned over the guard's dental records. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his

¹¹ *Waples*, 945 A.2d 1168, 2008 WL 555647, at *1.

¹² Transcript at A-19.

rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, the State did turn over the guard's dental bills, which do describe what the dentist did.

4. Demeanor

Waples alleges that the prosecutor improperly commented on his demeanor during his closing statement. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples is simply wrong. During his closing statement the prosecutor stated, "I'm not going to comment on the defendant's testimony, but remember his demeanor on that stand; how angry he got."¹³ The Supreme Court stated in *Hughes v. State* that the practice of commenting on the defendant's demeanor is "pregnant with potential prejudice."¹⁴ However, a significant difference exists between *Hughes* and this case. In *Hughes*, the defendant did not testify. Waples testified in his defense in this case. Thus, he put his credibility at issue, making it appropriate for the prosecutor to comment on his demeanor. This allegation is without merit.

¹³ Tr. at B-181.

¹⁴ 437 A.2d 559, 572 (Del. 1981).

5. Closing Statement

Waples alleges that the prosecutor misstated evidence in his closing statement. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples does not state what evidence the State misstated. This allegation is conclusory and, as such, without merit.

C. Plain Error

1. Waples alleges that the Court committed an error in his sentencing because the sentence was based upon false information. The false information is, according to Waples, the fact that he was convicted of a crime that he did not commit. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples was sentenced properly. He was sentenced to four years at Supervision Level V, suspended after two years for probation. 11 Del. C. § 1254(a) mandates that a person convicted under that section be imprisoned for a mandatory

minimum period of two years. This allegation is without merit.

2. Waples also alleges that it was plain error for the Court not to issue a judgment of acquittal. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, the Supreme Court concluded that the evidence supported Waples' conviction.¹⁵ This allegation is without merit.

D. Discovery

Waples alleges that the State committed a *Brady*¹⁶ violation because the prosecutor waited until the day of trial to disclose that the guard's tooth had been knocked out. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, *Brady* applies to exculpatory evidence. This evidence was not exculpatory. This allegation is without merit.

¹⁵ *Waples*, 945 A.2d 1168, 2008 WL555647, at *2.

¹⁶ *Brady v. Maryland*, 373 U.S. 83 (1963).

E. Proof

Waples alleges that the State did not prove that he committed a crime. Waples appealed this issue to the Supreme Court, which found that the evidence was sufficient “for a rational trier of fact to conclude that Waples, while incarcerated, intentionally caused physical injury to a correctional officer.”¹⁷ This claim was raised on appeal and is, therefore, barred by Rule 61 (i)(4) unless reconsideration of the claim is warranted in the interest of justice. Waples has merely repeated a claim that he has already made. Therefore, he has not met this requirement. This allegation is without merit.

F. Abuse of Discretion

Waples alleges that the Court abused its discretion when it denied his motion to compel the State to turn over the Department of Correction’s manual on the “use of force.” Waples believes that the guard’s “use of force” was an integral part of his defense. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. This allegation is without merit.

G. Constitutional Violation

Waples alleges that his constitutional rights were violated. This claim, vague as it is, could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show

¹⁷ *Waples*, 945 A.2d 1168, 2008 WL 555647, at *2.

cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. This allegation is without merit.

H. Indictment

Waples alleges that the indictment is faulty because it did not state the specific time that the assault took place. Waples believes that by failing to allege the specific time, he did not get adequate notice. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples is simply wrong. The indictment states that Waples, “on or about the 30th day of October 2006, in the county of Sussex, State of Delaware, did being a person confined in a detention facility, intentionally caused physical injury to a correctional officer, Michael Megee, in violation of 11 Del.C. § 1254 of the Delaware Code.” The indictment lists the date the offense occurred and the location. It was not necessary to state the time of the assault in the indictment as it was immaterial to the crime charged.¹⁸ This allegation is without merit.

¹⁸ See *State v. Bittenbender*, 2001 WL 789663 (Del. Super. June 25, 2001).

I. Inflammatory Testimony

Waples alleges that the guard's testimony was so inflammatory that it prevented him from receiving a fair trial. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Waples' argument focuses on the time during the trial when the guard pulled out his partial denture to show the jury that he had lost a tooth. The partial denture went to the specific issue of whether or not the guard sustained a physical injury. The probative value of the guard's testimony outweighed any prejudice that occurred when he pulled out his partial denture. This allegation is without merit.

J. Self-Defense and Unlawful Force

Waples alleges that he had a right to defend himself against being "capstunned" and his constitutional rights were violated when he was sprayed in the face. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. This allegation is without merit.

K. Side-Bar Conferences

Waples alleges that it was inappropriate to recreate side bar conferences ex post facto. This claim could have been raised on appeal and is, therefore, barred by Rule 61 (i)(3) unless Waples is able to show cause for relief from the procedural bar and prejudice as a result of a violation of his rights. The bar to relief under Rule 61 (i)(3) does not apply pursuant to Rule 61 (i)(5) if Waples can make a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings that led to the judgment of conviction. Waples has not met any of these requirements. Moreover, Waples does not allege any specific instances where a particular side-bar conference violated a fundamental right. This allegation is conclusory and, as such, without merit.

CONCLUSION

Bruce L. Waples' motion for postconviction relief is DENIED.

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary's Office